

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|----------------------------------|---|-----------------------|
| DON A. LEE |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| LARNED STATE HOSPITAL |) | |
| Respondent |) | Docket Nos. 241,965 & |
| |) | 242,026 |
| AND |) | |
| |) | |
| STATE SELF INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Claimant requested review of the August 11, 2008 Review and Modification Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on November 13, 2008.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Both parties agree that claimant's functional impairment is not at issue. Rather, the only issue for purposes of this appeal is whether claimant is permanently and totally disabled. The ALJ deferred any determination on the issue of post-award attorney's fees and the parties understand that the Board will not consider that issue at this time.

ISSUES

The ALJ concluded the claimant failed to sustain his burden of proof that he is permanently and totally disabled.¹ The ALJ summarized his findings as follows:

. . . [c]laimant has misrepresented his physical limitations and engaged in consciously understating his physical abilities. . . .²

The claimant requests review of the ALJ's denial of his request for a modification of his Award. Claimant adamantly maintains that he is presently unable to engage in substantial, gainful work activities based upon both Dr. Fluter's testimony as well as that offered by Mr. Benjamin. Thus, claimant requests the Board modify his Award and grant him permanent total disability benefits.

Respondent maintains the ALJ should be affirmed in all respects. Respondent contends that claimant has been less than forthright about his past medical history as well as his capacity to engage in activities, as evidenced by the surveillance DVD. And as a result of that surveillance DVD, Dr. Stein imposed less restrictive restrictions upon claimant and concluded that he was not permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Review and Modification Award sets out findings of fact and conclusions of law that are exceptionally detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

Briefly summarized, claimant sustained two separate injuries to his low back which were both settled on November 3, 1999. Claimant's right to future medical benefits and review and modification of that Award remained open. In 2002, claimant sought and received additional medical treatment in the form of surgery to his back. Then in 2004, claimant again had surgery to remove some of the screws used to anchor the instrumentation in his back.

Thereafter, claimant moved to Casa Grande, Arizona and applied for social security disability, which was granted.

¹ ALJ Award Rev. & Mod. (Aug. 11, 2008) at 2.

² *Id.*

Claimant has, since the 2004 surgery, attempted to return to work but was not successful on any long term basis. Suffice it to say, claimant is successful at finding work within his skill set (as a nurse with experience as a drug and alcohol counselor) but is unsuccessful at maintaining that employment. He acquired a job at a private prison as a nurse, but quit that job after just 3 days because he couldn't handle the case load. He worked at the Arizona State Hospital for approximately 3 months, but quit that job because of back pain. These jobs satisfied the requirements which claimant needed to maintain his nursing certification but because he did not work longer than 9 months, his social security disability status was not changed.

During the regular hearing, claimant explained that he was unable to engage in any significant physical activity. He testified that he is limited to no more than 15 minutes at a time of sitting, standing or walking. He went on to testify that he would need to change positions at 15 minute intervals, alternating between sitting, stretching, and moving around, and that if he was allowed to do that, he could last as long as four hours in a day before he would become exhausted and have to lie down and rest. He described himself as unable to bend forward 90 degrees at the waist, and consistently dependent on a cane to walk. He went into great detail to describe all the assistive devices in his home so that he can reach items without having to bend.

Claimant testified that he is able to drive a vehicle, although he takes a significant number of narcotic medications, including oxycontin and oxycodone on a daily basis.

Claimant was examined by two physicians for purposes of this Review and Modification proceeding. At his attorney's request, Dr. Flutter, a physiatrist, examined claimant on August 27, 2005 and diagnosed "failed back syndrome". He assigned a 25 percent permanent partial impairment based on the 4th Edition of the *Guides*.³ And while he noted that claimant's presentation suggested symptom magnification, Dr. Flutter restricted claimant to sedentary duty. He also testified that based on claimant's recitation of his own limitations, claimant was permanently and totally disabled.

Dr. Flutter explained that although claimant's percent of functional impairment and restrictions had not changed since his original surgery and that, in isolation, claimant retains the ability to engage in substantial gainful activity on a sedentary basis, it was claimant's recitation of his limitations that persuaded him that claimant was permanently and totally incapable of engaging in substantial gainful activity.

Claimant was also examined by Dr. Paul Stein, a neurosurgeon, on January 11, 2008. During this examination claimant told Dr. Stein he was unable to drive and must use a cane to walk. Like Dr. Flutter, Dr. Stein restricted claimant to sedentary work activities.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

Thereafter, Dr. Stein was provided a copy of a surveillance DVD which depicts at least some of claimant's public activities on March 7 and 8, 2008. In this DVD, claimant is observed (on March 8, 2008) outside his apartment waxing his truck for approximately 2 hours. In addition, there are times he bends down to pick up a small dog or other items from the ground. During this entire portion of the DVD, between 1:00 pm and 3:00 pm on that day, claimant is seen walking in and out of his apartment, bending at the waist, bending and/or kneeling down to the ground, and somewhat vigorously rubbing on the surface and side of his truck. He is not using a cane. He does not demonstrate any difficulty walking, stepping up or down the sidewalk while waxing his truck. He is clearly able to sustain activity for longer than 15 minutes and this includes standing, bending over, moving both arms and walking. At no point during this 2 hour period does claimant take an extended period to rest, lie down or even sit down, at least as far as is depicted on the DVD and based upon the time stamp on the screen.

Based on this surveillance, Dr. Stein lessened claimant's work restrictions and assigned him to the "light" category of work. This less restrictive category of work opens up additional employment opportunities and reaffirms Dr. Stein's opinion that claimant is not permanently and totally disabled.

Both vocational specialists agree that claimant is not permanently and totally disabled just by reason of the physicians' restrictions. Rather, it is the claimant's perceptions and descriptions of his personal limitations that limit his employment and arguably qualify him for permanent total disability status.⁴

After considering all this evidence, the ALJ denied claimant's request for permanent total disability benefits. He summarized his conclusions as follows:

The surveillance video tips the scale against [c]laimant. He is seen engaging in significant physical activities for two hours. Anyone who has polished a vehicle can attest to the strength and stamina required to extend at the waist and push down and rub with an outstretched hand. Claimant is observed to engage in this activity for an extended period, far in excess of his self-described 15-minute limit, without any apparent discomfort. He is observed to walk, without any apparent discomfort, without an apparent limp, and without the cane he described as necessary for ambulation. He is seen, on multiple occasions, bending forward at the waist to ground level, something he testified he is incapable of performing.

If [c]laimant's self-described physical limitations, which even he does not observe, are not controlling, witnesses agree that he is not permanently and totally disabled. The court finds [c]laimant's testimony less than credible, and his evidence in support of his permanent total disability less than compelling. Claimant has failed to sustain

⁴ ALJ Award Rev. & Mod. (Aug. 11, 2008) at 7.

his burden of proof that he is entitled to Review and Modification of his November 3, 1999 Award, or that he is currently permanently totally disabled.⁵

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.⁶

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁷ If there is a change in the claimant's work disability, then the award is subject to review and modification.⁸

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.⁹ Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.¹⁰

The Board has considered the record as a whole and finds the ALJ's decision should be affirmed. The Board finds that claimant has failed in his burden of proof to

⁵ *Id.*

⁶ K.S.A. 44-528.

⁷ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁸ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁹ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

¹⁰ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

establish that there is a change in his condition such that he is now realistically unemployable and that he is entitled to permanent total disability benefits. Simply put, the surveillance DVD demonstrates that claimant's description or perception of his capabilities is inconsistent with his true capacity. Admittedly, the surveillance is from a single day and even then, just for a few hours on that day. But claimant's activities on that day are in stark contrast to his recitation of his own limitations. Claimant testified that he cannot bend down to pick up anything and yet he is seen doing so several times over the course of the DVD. He denies being able to sustain any significant activity for more than 15 minutes and yet, he waxed the hood of his truck for 2 hours almost *continuously*, bending and stooping periodically and alternately using both his hands. Given this evidence, the Board finds the ALJ's findings and conclusions are well founded and should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated August 11, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge